

Exhibit 64

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

VS.

1:21-CV-296 CMH/JFA

FAIRFAX COUNTY SCHOOL BOARD,
ET AL.

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE CLAUDE M. HILTON
UNITED STATES DISTRICT JUDGE

Proceedings reported by stenotype, transcript produced by
Julie A. Goodwin.

1 suppression case where what was procedurally irregular there
2 was the day after Shelby County came down from the Supreme
3 Court that eliminated the pre-clearance requirement, the
4 legislature rushed to pass a voter suppression bill and -- and
5 that was a procedural irregularity that actually bore upon
6 discriminatory effect or an intent. You have nothing like that
7 in this case.

8 There -- there is just no -- no allegation anywhere
9 in the complaint that shows an intent to harm Asian-Americans
10 or to prejudice against Asian-Americans.

11 And then last point on standing, you heard no
12 response to the problem that we've made, that we've pointed out
13 is the main problem, and that is the members don't have control
14 over the decisions of the entity. And that's a fundamental
15 requirement under *Hunt*, and he -- but we would ask you to
16 decide both issues and to dismiss the case with prejudice.

17 Thank you.

18 THE COURT: Well, they have allegations here that
19 there are a limited number of positions at TJ, so that this
20 desire to -- for diversity or for racial mixing goes at the
21 majority of the students who are there now, or the biggest
22 group of students who are there now, and that this has been
23 intentionally done. And while you -- you say that the policy
24 itself states that it's going to be race-neutral, everybody
25 knows that the policy is not race-neutral, and it's designed to

1 affect the racial composition of the school.

2 MR. RAPHAEL: So assuming all of that is true, under
3 *Parents Involved*, it is -- does not trigger strict scrutiny.
4 That's the holding of *Parents* -- of the concurrence in *Parents*
5 *Involved* and the four other circuits. Race consciousness does
6 not trigger strict scrutiny. What triggers strict scrutiny is
7 if you treat a particular individual differently because of
8 their race on purpose, and that's not happening here. And then
9 it's also not a limited number of --

10 THE COURT: Well, if -- if this policy -- it seems to
11 me that they're alleging that this school board has come up
12 with a policy that is directly aimed at reducing the number of
13 Asian students at TJ. And that can be done in a variety of
14 ways without just simply coming out and limiting the race of
15 the people that are there.

16 I don't know the numbers in these schools or -- but
17 I'm sure that you can change the numbers as to the -- how they
18 affect each school and each geographical area, and you could
19 probably come up with whatever you intended to do. And they
20 have some statements here that seem to indicate that that's
21 what it's about. We want more diversity, so that means we want
22 less Asians here.

23 MR. RAPHAEL: Well, but -- so we want more diversity,
24 that statement is fine. Right? That that -- they concede that
25 at page 25 of their opposition brief. Under *Parents Involved*,

1 wanting more diversity is --

2 THE COURT: Well, it's not the statement that bothers
3 me. It's what they're doing and how it affects the Asian
4 composition of the school.

5 MR. RAPHAEL: Yeah. Well, so --

6 THE COURT: I mean, you can say all sorts of good
7 things while you're doing others.

8 MR. RAPHAEL: Well, but, again, why wouldn't that
9 argument have applied in *Feeney* where the veterans preferences
10 reduced -- you know, benefitted 92 percent of veterans were
11 men, but they weren't -- it wasn't adopted to harm women.

12 You have to show an intent to harm Asian-Americans.
13 Wanting to help underrepresented minorities isn't enough, and
14 that's the holding of all the cases we've cited: *Parents*
15 *Involved*, the First Circuit, Third Circuit, Fifth Circuit,
16 Sixth Circuit, all of those cases say that. It's -- and if
17 you -- it's fine to try to plead intentional discrimination
18 against Asian-Americans, but you have to allege facts that
19 plausibly show that. And when you look at the statements that
20 they've cited in table -- in Exhibit A -- just please take a
21 look at that because the facts -- none of the statements
22 actually suggest an intent to harm Asian-Americans.

23 Last point on this. Suppose when law schools
24 didn't admit women and they were ordered to admit women under
25 the Equal Protection Clause, could a -- a male or a minority

1 THE COURT: All right. Thank you.

2 MR. RAPHAEL: May I make one response?

3 THE COURT: You may use 30 seconds.

4 MR. RAPHAEL: Yes, Your Honor.

5 On *McCrory*, *McCrory* does not stand for the
6 proposition that Ms. Wilcox says. She says, you don't have to
7 show animus. That's not exactly right. What *McCrory* said is,
8 we're not saying the legislature necessarily had racial hatred
9 against Black people. The legislature defended the decision by
10 saying, they -- they -- they adopted these suppression moves
11 because they wanted to discriminate against Democrats, and most
12 Black voters vote Democrat.

13 The Court said, that's -- that's still
14 discrimination on the basis of race. That's intentional
15 discrimination, and that's absent in this case. No factual
16 allegations to show it.

17 Thank you, Your Honor.

18 THE COURT: All right.

19 Well, I am -- as far as the standing issue is
20 concerned, I'm satisfied that this is a voluntary association
21 with members that set out to accomplish or be involved in some
22 common purpose and that they do have every right to bring this
23 lawsuit.

24 As to the motion to dismiss, I find that the -- the
25 plaintiff has stated a claim that can go forward. Some of your

1 UNITED STATES DISTRICT COURT)
2 EASTERN DISTRICT OF VIRGINIA)
3

4 I, JULIE A. GOODWIN, Official Court Reporter for
5 the United States District Court, Eastern District of Virginia,
6 do hereby certify that the foregoing is a correct transcript
7 from the record of proceedings in the above matter, to the best
8 of my ability.

9 I further certify that I am neither counsel for,
10 related to, nor employed by any of the parties to the action in
11 which this proceeding was taken, and further that I am not
12 financially nor otherwise interested in the outcome of the
13 action.

14 Certified to by me this 20TH day of JUNE, 2021.
15
16
17

18 /s/
19 JULIE A. GOODWIN, RPR
20 Official U.S. Court Reporter
21 401 Courthouse Square
22 Eighth Floor
23 Alexandria, Virginia 22314
24
25